

FCC MAIL SECTION

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

FCC-92-540

In the Matter of: )

Implementation of Section 3 of the )  
Cable Television Consumer Protection )  
and Competition Act of 1992 )

Tier Buy-Through Prohibitions )

MM Docket No. 92-262 ✓

NOTICE OF PROPOSED RULE MAKING

Adopted: December 10, 1992;

Released: December 11, 1992

Comment Date: January 13, 1993

Reply Comment Date: January 28, 1993

By the Commission:

**I. INTRODUCTION**

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or "the Act") became law. Section 3(b)(8) of the Act, which amends Section 623 of the Communications Act of 1934, generally prohibits cable operators from requiring subscribers to purchase any "tier" of service, other than the basic service tier, "as a condition of access to video programming offered on a per channel or per program basis."<sup>2</sup> This is commonly referred to as the "buy-through" prohibition. Section 3(b)(8) specifies certain exceptions and limitations to the prohibition and provides waiver authority to the Commission in certain circumstances. Specifically, §3(b)(8)(B) provides that for a period of 10 years or, if sooner, until a system is modified to eliminate technological impediments to the unbundling of "pay" channels or "pay-per-view" services from other tiers of service, the prohibition shall not apply to a system "that, by reason of the lack of addressable converter boxes or other technological limitations, does not permit the operator to offer programming on a per channel or per program basis. . . ." 47 U.S.C. §543(b)(8)(B). The Act also requires that the Commission, within 180 days after enactment (*i.e.*, by April 3, 1993), prescribe regulations to prevent evasions of the provisions

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<sup>1</sup> Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>2</sup> 47 U.S.C. §543(b)(8)(A). Other provisions of Section 3 of the Act require the Commission to adopt regulations concerning subscriber rates. These are being addressed in a separate proceeding.

relating to the general rate regulation rules, which include the buy-through prohibition. 47 U.S.C. §543(h). With this Notice we seek comment on various issues relating to how the Commission can most effectively and efficiently implement the buy-through provisions of the Cable Act of 1992.

2. "Tiering" of nonbasic subscriber programming services became commonplace in the late 1970s.<sup>3</sup> Tiering involves the packaging and sale of channels of programming for separate or incremental charges. Cable systems that offer their services in tiers frequently do so in a cumulative fashion, requiring subscribers to buy-through successive tiers of services in order to subscribe to each higher-tiered service or to a service offered on a per channel or per program basis. Cable system operators generally control access to premium and pay-per-view services by using either addressable or non-addressable technology. Older cable systems using non-addressable technology generally use passive traps (frequency selective filters), non-addressable converters, or non-addressable converter/descramblers. This methodology requires the installation and removal of physical devices (traps or different converters) generally at the subscriber's premises in order to add or delete channels or groups of channels. Newer cable systems using addressable technology have the capability to communicate electronically from their headends to those of its subscribers who have appropriate addressable equipment, such as addressable taps or converters. Consequently, cable systems using addressable technology can make available different levels of cable services electronically, often instantaneously, from their headend. Some cable systems employ a hybrid of addressable and non-addressable technology.

3. The goal of the Act's buy-through prohibition is to foster the ability of subscribers to choose freely among available programming services. The Senate Committee Report states that "[t]hrough unbundling, subscribers have greater assurance that they are choosing only those program services they wish to see and are not paying for programs they do not desire." S. Rep. No. 102-92, 102d Cong., 2d. Sess. (1992) at 77.

## II. DISCUSSION

4. Current Technological Limitations - Fundamental to any regulation implicating tiering practices of cable system operators is a clear understanding of the technical processes and equipment involved in providing and preventing subscribers' access to individual programs and channels and groups of channels carried on a cable system. Additionally, in order to fashion regulations that are effective without imposing excessive or undue burdens or expense on cable operators or subscribers, we must know the current state of the industry capabilities and the complexity and expense of various

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<sup>3</sup> See Community Cable TV, Inc., 95 FCC 2d 1204, 1216 (1983); Teleprompter Corporation, 87 FCC 2d 531, 561 n. 69 (1981).

levels and kinds of modification.<sup>4</sup> This is particularly relevant in implementing the buy-through prohibition, for we need to know how best to define those cable systems whose "lack of addressable converter boxes or other technological limitations" does not permit them to offer programming on a per channel or per program basis in the manner that the statute seeks to achieve. We note in this regard that the Senate Committee Report states that "only about one quarter of all cable systems are addressable, having the technology to isolate all channels." S. Rep. No. 102-92, 102d Cong. 2d Sess. (1992) at 77. Accordingly, we seek information on how widespread various kinds of access-relevant equipment are in cable systems today, and whether and how the existence of particular kinds of equipment generally coincides with other system characteristics.<sup>5</sup>

5. We also seek comment generally on the practical implications of Congress' concern that technological limitations other than the lack of addressable converter boxes could preclude or impede compliance with the Act. Specifically, we seek comment upon the types of equipment or cable system design which would present such technological limitations. For example, how should the buy-through provisions operate in instances in which only one community among several served by the same cable system has addressable capability, or in which various levels of services are offered to different communities or subscribers within a community? Also, we note that certain cable systems employ addressable as well as non-addressable technology. We seek comment upon how such hybrid systems should be treated under the Act's buy-through prohibitions.

6. Applicability of 10-Year Exception - The Act gives cable operators, who by reason of non-addressability or other technological limitation cannot comply with the buy-through prohibition, a 10-year period to come into compliance. 47 U.S.C. §543(b)(8)(B). This period is subject to extension by waiver if the Commission determines that compliance would require a cable operator to increase its rates. Commenters may address whether Congress contemplated some minimum effect on rates, under which a waiver would not be appropriate. 47 U.S.C. §543(b)(8)(C). The Act also provides that such exception ceases once the technology utilized by the cable operator's system is improved in a way that eliminates the technological limitation. 47 U.S.C. §543(b)(8)(B)(i). We believe that, under the Act, cable systems which were not designed and built with (or upgraded to incorporate) addressable technology are by definition within the scope of the Act's 10-year exemption. We seek comment upon this interpretation. We also seek specific comment on the nature and scope of modifications of such systems which would allow cable

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<sup>4</sup> In particular, we are interested in the implementation of digital compression technologies which can also be used to increase dramatically the number of channels on a cable system.

<sup>5</sup> For example, do systems of a certain age, size or density characteristically require individually installed trapping devices or filters to restrict channel access? Are characteristics and technical capabilities relevant to this inquiry generally uniform throughout a franchise area, or throughout a multi-franchise system?

operators to comply with the Act's buy-through provisions. In this regard, we seek comment on those instances in which modifications are to be made over a long period of time. For example, in such instances, should the Act's buy-through provisions be applied only to the modified portion of a cable system? <sup>6</sup>

Further, are there modifications that are so simple or inexpensive that they can or should be required to be made in accordance with the provisions of this Act?

7. Definition of "Discrimination Between Subscribers" - The buy-through restrictions in the Act also prohibit cable operators from "discriminat[ing] between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis." 47 U.S.C. §543(b)(8)(A). The basic service tier is described in the statute as the tier "to which subscription is required for access to any other tier of service." 47 U.S.C. §543(b)(7)(A). Thus, the non-discrimination provisions and the basic tier definition appear to work in tandem to mean that all cable subscribers will, at a minimum, purchase the basic tier; that subscribers purchasing only the basic tier are entitled to "buy through" to premium or pay-per-view services without subscribing to intermediate services or tiers of service (e.g., tiers commonly known as "expanded basic"); and that basic tier subscribers who do "buy through" are entitled to the same rate structure for those premium or pay-per-view services as subscribers purchasing intermediate services or tiers. We seek comment on this interpretation of the buy-through provisions. In addition, we seek comment on how, in this context, discrimination might be defined to ensure compliance with this section of the Act and how we would determine that such discrimination has occurred.

8. Related issues arise, furthermore, as systems achieve a higher degree of addressability. Greater addressability may mean --- and, indeed, may be intended by Congress to encourage --- that channels today offered on "expanded basic" tiers are unbundled and offered on a per channel basis. Such a development may implicate the meaning of "discrimination" for purposes of this section of the Act. As systems move toward a la carte provision of program services and the number of channels available to a subscriber increases, the marginal utility, or value to the customer, of additional channels may decrease. Additionally, the per channel cost of providing the service may decrease in relation to such fixed costs as plant, equipment, and administration. What pricing schemes would be consistent with the buy-through prohibition restrictions that would permit individual subscriber "customization" of service and that would recognize both the decreasing incremental costs and the marginal utility to the subscriber of additional channels of service? Can multiple channel discounts that are not channel

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<sup>6</sup> Section 17 of the Act directs the Commission to issue regulations, within 18 months from the date of enactment of the Act (i.e., by April 5, 1994), on methods of assuring compatibility between consumer electronics equipment (e.g., television and VCRs) and cable systems, consistent with the need to prevent theft of cable service. We recognize that these compatibility requirements might affect certain technical aspects of the Act's buy-through prohibition.

specific be offered without running afoul of the discrimination prohibition?<sup>7</sup> Does this provision permit the offering of multiple, and perhaps overlapping, tiers on a noncumulative basis? We also seek comment on whether, in order to further implement the discrimination provisions of the Act, all subscribers on an addressable system must be provided with addressable converters and, if so, what flexibility cable operators have, consistent with the equipment and rate provisions of the Act, to charge for such equipment.<sup>8</sup>

9. Waiver of the Buy-Through Provisions - The Cable Act of 1992 provides the Commission with the authority to grant waivers of the buy-through prohibitions to the extent consistent with the public interest, if enforcement would cause a cable operator to increase its rates. (47 U.S.C. §543(b)(8)(C).) Subsection B already includes an exception to the prohibition for systems that lack the technical capability to comply, obviating the need for a waiver in such cases during the first ten years after enactment. We seek comment on whether there are other circumstances in which a waiver would be necessary and appropriate either during the Act's initial 10-year period, or in the context of requests for extensions of the 10-year period. We also seek comment on what regulations or guidelines, if any, we should promulgate at this time for evaluating any such waiver request. In addition, we seek comment as to whether new cable systems constructed during the 10-year period of the exception can or must be required to comply with the buy-through prohibition upon construction.

10. Reduction of Administrative Burdens - Finally, we note that the Act requires us to design implementing regulations in this area in such a way as "to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers." 47 U.S.C. §543(i). See also 138 Cong. Rec. S14,608-09 (daily ed. Sept. 22, 1992) (urging reduced administrative and waiver burdens for small system operators). We seek comment on how this directive can best be accomplished when implementing the buy-through restrictions.

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<sup>7</sup> For example, could a specific group of channels be offered at a price of \$5.00 for one channel, \$4.00 for any second channel, \$3.00 for any third channel, and so on? Can a subscriber who buys HBO be offered Showtime for a price lower than a subscriber who does not buy HBO?

<sup>8</sup> The Act also indicates that the Commission should act to prevent evasions of the requirements established in Section 3. 47 U.S.C. §543(h). Section 3 of the Act primarily focuses on various rate issues that are being discussed in a separate proceeding. However, to the extent there are distinct issues of evasion specific to the "buy-through" provisions of the Act, parties are invited to comment on them here.

### III. ADMINISTRATIVE MATTERS

#### Ex Parte Rules -- Non-Restricted Proceeding

11. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. See generally 47 C.F.R. §§1.1202, 1.1203 and 1.1206(a).

#### Comment Information

12. Pursuant to applicable procedures set forth in §§1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§1.415 and 1.419, interested parties may file comments on or before January 13, 1993 and reply comments on or before January 28, 1993. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

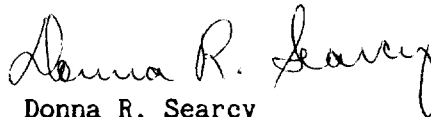
#### Regulatory Flexibility Act

13. As required by §603 of the Regulatory Flexibility Act, the FCC has prepared an initial Regulatory Flexibility Analysis [IRFA] of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the Notice, including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with §603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, Stat. 1164, 50 U.S.C. §§601 et seq. (1981)).

#### Additional Information

14. For further information concerning this proceeding, contact Barrett L. Brick, Cable Television Branch, Video Services Division, Mass Media Bureau (202) 632-7480.

FEDERAL COMMUNICATIONS COMMISSION



Donna R. Searcy  
Secretary

**APPENDIX  
INITIAL REGULATORY FLEXIBILITY ANALYSIS**

**Reason for Action**

This proceeding is being initiated to seek comments on the best way to implement §3(a) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, relating to prohibitions on buy-through marketing practices.

**Objectives**

The Commission's goal is to provide notice and opportunity to comment to members of the public regarding efficacious implementations of §3(a) of the new Act.

**Legal Basis**

Authority for this proposed rule making is contained in §§4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), and 303(r), and §3(a) of the Cable Consumer Protection and Competition Act of 1992, Pub. L. 102-385 (1992).

**Reporting, Recordkeeping, and other Compliance Requirements**

The Commission is asking for comment on what information should be reported and maintained in order to ensure compliance with the Act.

**Federal Rules that Overlap, Duplicate, or Conflict with Proposed Rule.**

None.

**Description, Potential Impact, and Number of Small Entities Involved.**

The rules to be developed in this proceeding would impose new burdens on some cable operators, including smaller ones, by requiring them, within ten years, to ensure that their technology enables them to provide programming to subscribers on a per program or per channel basis without requiring the subscriber to buy through intermediate tiers of services. The proceeding does, however, seek comment on how this burden could be mitigated for cable operators serving 1000 or fewer subscribers.

**Any Significant Alternative Minimizing the Impact on Small Entities Consistent with the Stated Objectives.**

None.